YOGANANTHY AS THAMBAIYA A

v.

IDRIS OSMAN

COURT OF APPEAL, PUTRAJAYA B
SURIYADI HALIM OMAR JCA
RAMLY ALI JCA
AZHAR MA'AH JCA
[CIVIL APPEAL NO: J-02-169-2002]
22 JULY 2009 C

CIVIL PROCEDURE: *Action - Reinstatement of action - Absence of plaintiff and her counsel at hearing of case - Case dismissed - Whether absence intentional or contumelious - Merits of plaintiff's action*

CIVIL PROCEDURE: *Absence of party - Absence of plaintiff and her counsel at hearing of case - Case dismissed - Whether absence intentional or contumelious - Merits of plaintiff's action* D

CIVIL PROCEDURE: *Parties - Absence - Absence of plaintiff and her counsel at hearing of case - Case dismissed - Whether absence intentional or contumelious - Merits of plaintiff's action* E

This was the plaintiff's/appellant's appeal against the decision of the High Court judge dismissing her application for reinstatement of her claim and her application to set aside the judgment on the respondent's counterclaim. The appellant's claim against the respondent was for breach of an agreement to transfer 55% of the shares in a company to her, while the respondent's counterclaim was for a liquidated sum of RM507,999.50. The appellant and her counsel were absent at the hearing of the case, and the judge dismissed the appellant's claim and entered judgment in favour of the respondent on the counterclaim. The main issue to be considered was whether the appellant had given sufficient and reasonable reasons for her or her counsel's absence on the trial date. F G H

Held (allowing the appeal with costs)
Per Ramly Ali JCA delivering the judgment of the court:

(1) On the facts, the conduct of the appellant and her counsel clearly and unequivocally did not reflect their intention to deliberately absent themselves from attending the trial. It was the conduct of a party who genuinely had the intention to I

proceed with the trial but was unable to attend court due to an innocent mistake with regard to the trial dates. There was no evidence to show that the appellant or her counsel was avoiding trial. Any inconvenience caused to the respondent at the material time could have been compensated by an award of costs. Furthermore, the facts of the case showed that the appellant's claim and her defence to the counterclaim had merits. Thus, the judge had clearly failed to properly consider those factors when dealing with the appellant's applications to reinstate her claim and to set aside the judgment on the counterclaim. The appellant must be given the opportunity to defend herself in circumstances where her absence from trial was not intentional or contumelious. *Buga Singh v. Koh Bon Keo* (foll); *Hayman v. Rowlands* (foll).

[Appellant's claim reinstated and judgment on the counterclaim set aside.]

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan plaintif/perayu terhadap keputusan hakim Mahkamah Tinggi menolak permohonannya untuk menghidupkan semula tuntutannya dan permohonannya untuk mengenepikan penghakiman yang dicatatkan atas tuntutan balas responden. Tuntutan perayu terhadap responden ialah bagi pelanggaran suatu perjanjian untuk memindah 55% syer-syer dalam sebuah syarikat kepadanya, sementara tuntutan balas responden adalah untuk suatu jumlah yang telah ditentukan sebanyak RM507,999.50. Perayu dan peguamnya tidak hadir pada perbicaraan kes, dan hakim telah menolak tuntutan perayu dan mencatatkan penghakiman dalam pihak responden atas tuntutan balas tersebut. Isu utama yang perlu ditimbangkan ialah sama ada perayu telah menyediakan sebab-sebab yang mencukupi dan munasabah bagi ketidakhadirannya atau peguamnya pada tarikh perbicaraan tersebut.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:

(1) Berdasarkan fakta-fakta, kelakuan perayu dan peguamnya jelas dan nyata tidak mencerminkan niat mereka untuk sengaja tidak menghadiri perbicaraan tersebut. Ia merupakan kelakuan suatu pihak yang benar-benar mempunyai niat untuk meneruskan dengan perbicaraan tersebut tetapi tidak dapat hadir di mahkamah disebabkan suatu kesilapan tidak salah berhubung

dengan tarikh-tarikh perbicaraan. Tidak ada apa-apa keterangan untuk menunjukkan bahawa perayu atau peguamnya cuba mengelakkan perbicaraan. Apa-apa kesulitan terhadap perayu pada masa material boleh dibayar pampasan melalui satu award kos. Lagipun, fakta-fakta kes menunjukkan bahawa tuntutan perayu dan pembelaannya terhadap tuntutan balasa mempunyai merit. Oleh itu, hakim telah jelas gagal menimbangkan dengan betul faktor-faktor tersebut apabila menyelesaikan permohonan perayu untuk menghidupkan semula tuntutannya dan untuk mengenepikan penghakiman yang dicatakan atas tuntutan balas itu. Perayu mesti diberikan peluang untuk membela dirinya dalam keadaan-keadaan di mana ketidakhadirannya dari perbicaraan tidak disengajakan atau menghina. *Buga Singh v. Koh Bon Keo* (diikuti); *Hayman v. Rowlands* (diikuti).

[Tuntutan perayu dihidupkan kembali dan penghakiman yang dicatatkan atas tuntutan balas diketepikan.]

Case(s) referred to:
Buga Singh v. Koh Bon Keo [1966] 1 LNS 22 ***(foll)***
Burgoine v. Taylor [1878] 9 Ch D 1 ***(refd)***
Cockle v. Joyce [1877] 7 Ch D 56 ***(refd)***
Hayman v. Rowlands [1957] 1 All ER 323 ***(foll)***
Shocked v. Goldschmidt [1998] 1 All ER 372 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 35 rr. 1(2), 2

For the appellant - Dato' Dominic J Puthucheary (Firoz Hussein with him); M/s Puthucheary Firoz & Mai
For the respondent - PK Nathan (Fadzilah Mansor with him); M/s PK Nathan & Co

[Appeal from High Court, Johor Bahru; Suit No: 22-160-1995]

[Editor's note: For the High Court judgment, please see Yogananthy AS Thambaiya v. Idris Osman [2002] 7 CLJ 531.]

Reported by Suresh Nathan

JUDGMENT

Ramly Ali JCA:

[1] The present appeal is against the decision of the learned High Court judge dated 26 February 2002 wherein the learned High Court judge had dismissed with costs the appellant's application for reinstatement of her claim and her application to set aside the judgment dated 16 October 2000 on the respondent's counterclaim.

Factual Background

[2] The appellant's claim against the defendant is for breach of an agreement dated 8 February 1988 to transfer 55% shares in a company known as R & I Securities Sdn. Bhd. to the appellant being the shares promised by the respondent to be held by the appellant for assisting the respondent to set-up the said company but later being transferred to a third party.

[3] The respondent's counterclaim is for a liquidated sum of RM507,999.50 being an overpayment over the sale and purchase of shares transaction to the appellant.

[4] The appellant's claim was filed on 28 Jun 1995 whilst the respondent's defence and counterclaim were filed on 7 October 1995. The appellant filed her reply and defence to counterclaim on 1 November 1995.

[5] After a number of adjournments, the case was finally fixed for hearing on 16 and 17 October 2000. When the case was called up for hearing on 16 October 2000 the appellant and her counsel were absent. The respondent's counsel was present. So were the respondent and his witnesses. The respondent's counsel requested that the appellant's claim be dismissed with costs under O. 35 r. 1(2) of the Rules of the High Court 1980 and that the respondent be allowed to proceed with the trial on his counterclaim. After hearing submission of the respondent's counsel, the court allowed the respondent's application to dismiss the appellant's claim and proceeded with the hearing of the respondent's counterclaim in the absence of the appellant and her counsel. The court then gave judgment in favour of the respondent on the counterclaim.

[6] The appellant then on the same day filed two applications, namely for reinstatement of her claim and for setting aside the judgment on the counterclaim made on 16 October 2000.

[7] To support her applications, the appellant contended that she and her solicitors Dato' Dominic J Puthucheary and Asmat bin Nasruddin were in Johore Bahru at all material times (15 October 2000 and 16 October 2000) and they were genuinely and honestly under the impression that the trial dates fixed were 17 and 18 October 2000. The appellant explained that the disparity of the trial/hearing dates arose due to the miscommunication and misunderstanding of the dates when the same were communicated to the appellant's solicitors by another firm of solicitors who attended and mentioned on behalf of the appellant's solicitor on the mention date when the trial dates were fixed. According to the appellant her counsel were present at the Johor Bahru High Court on 16 October 2000 (to meet the appellant and to prepare for the trial), but they were unaware that the case was called up on that day (16 October 2000) which they had mistaken it to be on 17 October 2000 and 18 October 2000, until they were informed by the respondent's counsel at 4pm on 16 October 2000 that her claim had been dismissed and judgment on the counterclaim was given in favour of the respondent against the appellant.

[8] In objecting to the applications, the respondent contended that the case had been fixed for trial earlier on three occasions and the appellant had on two out of the three occasions applied for adjournment, that the respondent had assembled all his witnesses and had incurred considerable expense in securing the attendance of one of his witnesses who resides in England and the respondent was ready to proceed with the trial of the appellant's claim as well as the respondent's counterclaim.

[9] On 26 February 2000 the learned judge dismissed both the applications to reinstate the appellant's claim as well as the application to set aside the judgment entered on the counterclaim.

The Relevant Law

[10] Order 35 r. 2 (RHC) confers a wide discretion to set aside any judgment or order obtained where one party does not appear at the trial, on the application of that party on such terms as the court thinks just. The court in dealing with such application must look at the reasons for the party's absence. The terms in such circumstances are usually that the party in default pays the costs of the day, which include all costs thrown away by reason of the trial

becoming abortive and the costs of the application to reinstate the case to the list. (see: *Burgoine v. Taylor* [1878] 9 Ch D 1 at 5; and *Cockle v. Joyce* [1877] 7 Ch D 56).

[11] In *Buga Singh v. Koh Bon Keo* [1966] 1 LNS 22, His Highness Raja Azlan Shah J had adopted a sound principle on the same issue laid down in the case of *Hayman v. Rowlands* [1957] 1 All ER 323 where Denning LJ said:

> I have always understood that, if by some oversight or mistake a party does not appear at the Court on the day fixed for the hearing, and judgment goes against him but justice can be done by compensating the other side for any costs and trouble to which he has been put, then a new trial ought to be granted. The party asking for a new trial ought to show some defence on the merits, but, so long as he does so, the strength or weakness of it does not matter.

[12] The most important consideration in this type of application is whether the appellant had given sufficient and reasonable reasons for her or her counsel's absence on the trial date. In the leading authority of *Shocked v. Goldschmidt* [1998] 1 All ER 372 the Court of Appeal held that on an application to set aside a judgment given after a trial in the absence of the applicant, the predominant consideration of the court is not whether there is a defence on the merits but the reason why the applicant was absent. If the absence was deliberate and not due to an accident or mistake, the court would be unlikely to allow a rehearing.

The Present Circumstances

[13] On the facts before the court, the evidence clearly shows that the absence of the appellant and her counsel were not deliberate and was due to a genuine belief that the trial dates fixed were 17 and 18 October 2000. The secretary to Dato' Dominic J. Puthucheary (the appellant's counsel) had telephoned the court on 10 October 2000 and was informed that the trial would proceed on 17 October 2000 and 18 October 2000. Then on 13 October 2000 the appellant's solicitors sent a letter to the Court stating *inter alia*, their understanding that trial was fixed for 17 and 18 October 2000. A copy of the letter was sent to the respondent's solicitors.

[14] Lead counsel for the appellant (Dato' Dominic J Puthucheary) flew to Johor Bahru on 15 October 2000, while Encik Asmet bin Nasruddin, his co-counsel flew to Johor Bahru on the 1st flight on 16 October 2000. Both counsel spent time with the appellant on 16 October 2000 preparing for the trial.

[15] The appellant's counsel rushed to the court on 16 October 2000 (after 4pm) on being told that the case was heard and disposed of on that day. The appellant's counsel appeared before the learned judge the very next morning on 17 October 2000 to seek clarification and explain their absence in court on 16 October 2000.

[16] The appellant's counsel filed both the applications for reinstatement and setting aside the judgment the very next day, ie, 17 October 2000.

[17] The conduct of the appellant and her counsel clearly and unequivocally do not reflect their intentions to deliberately and intentionally absent themselves from attending the trial. It is the conduct of a party who genuinely had the intention to proceed with the trial but was unable to attend court due to an innocent mistake with regard to the trial dates. There was no evidence to show that the appellant or her counsel were avoiding trial. Any inconvenience caused to the respondent at the material time, could have been compensated by an award of costs.

Merit Of The Appellant's Claim And Defence To Counterclaim

[18] The appellant in her applications must also show some merits in her claim as well as some defence on merit on the counterclaim. So long as she does that, the strength or weakness of it is immaterial (see: *Buga Singh v. Koh Bon Keo*; and *Hayman v. Rowlands (supra)*.

[19] In summary, the appellant's claim is for the transfer of 55% of shares in a company known as R & I Securities Sdn. Bhd. based on a statutory declaration dated 12 August 1987 and an agreement in writing dated 8 February 1988 between the appellant and the respondent where the respondent is alleged to have agreed to transfer the said shares to the appellant. The respondent admitted signing both the statutory declaration and the said agreement. The respondent's only pleaded defence is that both the documents were signed "in haste".

[20] In relation to the counterclaim, the appellant's defence is that the RM500,000 (as claimed by the respondent in the counterclaim) was paid to the appellant as a repayment by the respondent, of a loan (of the same amount) provided by the appellant to the respondent. Thus the appellant claims that there is no issue of overpayment as alleged.

Conclusion

[21] All the above considerations pertaining to the reasons for the appellant and her counsel's absence on the trial date (16 October 2000) as well as the merits of the appellant's claim and her defence to the counterclaim must be properly considered by the court in dealing with both appellant's applications to reinstate her claim and to set aside the judgment dated 16 October 2000 on the counterclaim. The learned judge had clearly failed to do so.

[22] The appellant must be given the opportunity to defend herself in circumstances where her absence from trial was not intentional, deliberate or contumelious.

[23] On the above considerations, this court unanimously allowed the appeal with costs. The order of the High Court dated 16 October 2000 is set aside. The appellant's claim is reinstated and the judgment on the counterclaim is set aside.